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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 524

MARY A. SCHWARTZ, as Executrix under the Last Will and Testament of SAMUEL H. SCHWARTZ, deceased,

Petitioner,

against

SS NASSAU, her engines, etc., and

against

INCRES STEAMSHIP COMPANY, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the order of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. 5a)* is officially reported at 223 F. Supp. 374. The opinion of the United States Court of Appeals for the Second Circuit, decided May 7, 1965, has been officially reported at 345 F. 2d 465, and is reproduced in the appendix hereto beginning at page 10.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 7, 1965, rehearing was denied on June 7, 1965.

The jurisdiction of this Court is invoked pursuant to the authority of 28 U.S.C. 1254 (1).

Questions Presented

Is a provision in a contract for carriage, requiring actual service of process in addition to commencement of an action within one year of injury, invalid, in that it reduces the minimum period granted by statute to institute suit?

Did the Court below err in refusing to consider the invalidity of a contract clause because that question was allegedly insufficiently raised in the District Court?

Statement

This suit was instituted under the Death on The High Seas Act (46 U.S.C. 761 *et seq.*) by the filing of a libel herein on May 3, 1962, to recover damages for wrongful

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* References to page numbers ending in "a" are to the Appendix in the Court of Appeals.

death of Libelant's husband, Dr. Samuel H. Schwartz, and for his pain and suffering. Decedent became ill on the high seas on May 7, 1960, while a passenger aboard Respondent's *SS Nassau* and died on May 8, 1960. On April 21, 1961 petitioner's attorney wrote defendant giving notice of an intended claim. On August 8, 1961 a New York State Supreme Court summons was served.

The contract of carriage as set forth in the ticket which covered the passage of decedent and his wife upon said vessel, provided among its terms, Clause "13" (21a-22a):

> "Suit to recover on any claim shall not be maintainable unless commenced *and process served* as follows:
>
> (1) Within one (1) year from the *date when the death* or injury occurred in respect of any claim for loss of life or bodily injury in any case where said Section 4283A shall apply." (Emphasis ours)

Respondent relied thereon on its motion for summary judgment, and in its said Third Defense, contending that Clause 13 time-barred this suit under the terms of 46 U.S.C. 183b. The District Court granted a motion for summary judgment dismissing petitioner's libel based upon the contract limitation clause and the Court of Appeals (Second Circuit) affirmed. A petition for reargument was denied on June 7, 1965.

Statute Involved

Section 4283A (46 U.S.C. 183b) reads, in pertinent part:

> "(a) It shall be unlawful for the manager, agent, master or owner of any seagoing vessel . . . transporting passengers . . . from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period . . . for the institution of suits on . . . claims (for loss of life or bodily injury) than one (1) year . . ."

"(c) . . . if the action is one for wrongful death, any lawful limitation of time prescribed for such contract shall not be applicable so long as no legal representative has been appointed for such . . . decedent's estate, but shall be applicable from the date of the appointment of such legal representative . . ."

Reasons for Granting the Writ

1.

The question of the validity of a clause in a contract of carriage requiring that an action be commenced and process served within one year of injury has been divergently ruled upon and there is a need for direction and a clear position on this issue in light of the provisions of 46 U.S.C. § 183b(a).

The United States District Court (Mass.) held flatly in *Abbasciano* v. *Home Lines Agency,* 144 F. Supp. 235, 236 (1956), that a clause requiring that suits be commenced and process served within one year was "not unreasonable" and was valid as far as the statute was concerned.

However, in an emphatic opinion delivered in 1958, Judge Irving Kaufman held in *Barrette* v. *Home Lines, Inc.,* 168 F. Supp. 141, that such a contract requirement was invalid because of the statutory provisions and legislative intent. The Court held that the statute "was designed to prevent shipowners from imposing upon passengers unreasonably short periods of limitation on actions for personal injury". The provisions were to be an "absolute standard, any breach of which is invalid". Judge Kaufman found the clause against public policy (at 143).

Five years later a New York State Supreme Court judge found in *Glusman* v. *U. S. Lines Co.,* 241 N.Y.S. 2d 960, 39 Misc. 2d 845, that under federal law (which it was held controlled liability for maritime torts), the *Barrette* deci-

sion was prevailing law. The Court found that *Barrette* had declared the "clause itself" invalid because it "did not conform to the statute".

Nevertheless, in the case at bar decided only three months later, Judge Dudley Bonsal of the United States District Court, Southern District of New York, upheld the clause's validity. The court did not grant the clause complete acceptability as *Abbasciano* had done, nor did it totally reject the clause as had *Barrette* and *Glusman*. Rather, Judge Bonsal attempted to distinguish *Barrette* and also to describe briefly at least one situation (8a) in which the contract provision at hand would not be upheld.

On appeal, the United States Court of Appeals (Second Circuit) affirmed, but by a split determination with a strong dissent by Judge Kaufman and even the majority opinion was more cautious about the clause's acceptability than Judge Bonsal had been.

The majority opinion did not grant complete approval to the clause. They stated (at 16) that "It does not follow from our holding the contractual limitation provision valid and enforceable in the present case that the provision would be enforceable in every conceivable fact situation". The majority in discussing *Barrette* stated that the circumstances suggested by Judge Kaufman illustrate an instance in which the clause would not be acceptable. However, this decision offers no guide lines or firm criteria by which parties would be able to determine the prudence of relying on the validity of such a clause or predicting its enforceability.

Judge Kaufman in his dissent objects at length to the entire approach adopted by the majority opinion. He feels that "the validity of the clause must be judged as of the time it was entered into and not on the basis of subsequent conduct or events occurring long after the contract was signed, sealed and delivered" (at 22).

The divergence of opinions and over-all lack of clarity in this area of federal law justifies review by this Honorable Court. The end result of the majority opinion in the Court below when put into practice, as evidenced by its effect upon the petitioner's claim herein, is contrary to Congressional intent, and harsh, inequitable and against public policy.

At the time the District Court decision herein was handed down, *Barrette* was the most recent pronouncement by the same District Court on the exact issue herein discussed. The contract clause in that case was concededly "identical" (7a) to that in the present case. Yet Judge Bonsal went on to distinguish *Barrette* despite an almost word for word similarity in these crucial terms.

The distinction made by Judge Bonsal was that *Barrette* did not involve subsection (c) of the statute. More will be said later about the Court of Appeal's refusal (at 12) to discuss the possibility that the contract deviated from the requirements in subsection (c) of 46 U.S.C., § 183b, stating that "the claim was not raised in the District Court". But in any event it seems clear that both *Barrette* and the present case involved questions under § 183b(a) (upon which Judge Kaufman based his *Barrette* opinion) and therefore this distinction drawn by Judge Bonsal is not crucial.

The decisions of the District Court and Court of Appeals are not in conformity with Congressional intent in drafting the statute. The Congress within the same year that saw passage of § 183b, also saw fit to pass § 183c, declaring it to be against public policy "to lessen, weaken or avoid the right" of any claimant to a trial of his claim for loss of life or bodily injury. The first case to construe the statute, *Moore* v. *American Scantic Line*, 30 F. Supp. 843, 845 (Southern District of New York, 1939), found it enacted "with reference to duties, obligations and restrictions on the carrier". Judge Kaufman has spoken of the statute

168 F. Supp. 143 as "an arbitrary standard of reasonableness which may not be whittled down through the ingenuity of the draftsman of a contract". The statute thus was designed to keep the shipping industry from "dictating unreasonably restrictive terms" and the courts should not read the clause with such judicial emendation as to place the burden upon every prospective passenger of "running to the nearest law library" to know the significance of what he is signing (at 20 and 21).

The clause at issue appeared in a contract of adhesion and as the Court stated in *Oceanic Steam Navig.* v. *Corcoran,* 9 F. 2d 724, 727 (CCA 2nd Cir. 1925), of this type of contract, "the individual customer has no real freedom of choice". As Judge Jerome Frank pointed out in his dissent in *Siegelman* v. *Cunard White Star,* 221 F. 2d 189, 204 (CCA 2nd 1955), "in contracts such as this the usual rules cannot be rationally applied". "In a take-it-or-leave-it contract, absent actual freedom to contract, the parties do not 'legislate' by mutual agreement; the dominant party 'legislates' for both" (at 205, 206). In dealing with such contracts there is a maxim that a fixed, printed form contract is to be construed most strongly against the drafter, 4 Williston Contracts § 621 (3rd Ed. 1961); 3 Corbin, Contracts § 559 (1960); Restatement of Contracts § 236. As Corbin has stated, 6 Corbin § 1376, "Standardized contracts . . . drafted by powerful commercial units and put before individuals on the 'accept this or get nothing' basis, are carefully scrutinized by the courts for the purpose of avoiding enforcement of 'unconscionable' clauses". In light of this unequal position the clause should not be upheld on a vague and uncertain basis being valid as to one set of facts and invalid as to another, but should forthrightly be declared invalid as Judge Kaufman did in *Barrette.*

Under the rationale of *Geller* v. *Holland-American Line,* 201 F. Supp. 508 (1961), a party would be deemed to have

assented to terms drafted by another simply by virtue of having the printed material in hand for the briefest time. Under this logic a choice would be accorded a party where delivery is made just minutes before departure, but as *Mertens* v. *Flying Tiger Line,* 341 F. 2d 851, 857, shows, Courts today will look twice at physical possession before actually considering a contract as delivered, therefore implying assent.

Barrette was prevailing law at the time of commencement of the libel herein. The Court below erred in distinguishing *Barrette* and in effect its decision would require a claimant to proceed at his peril in commencing a libel if the circumstances of his claim did not fit the pattern of *Barrette.* The majority opinion adopts the approach that the clause "should sometimes be deleted, should sometimes be augmented, and at other times is void under federal law" (at 17). To require a layman to examine all statutes referred to in a contract of adhesion and all interpreting decisions, is to make it even less likely that the subordinate party would know what he "assents" to, much less bargains for. Petitioner should not be deprived of a day in court solely because the decedent possessed for a few days a contract, written for and dictated to him and which was no longer possessed by petitioner when her right to a remedy arose.

2.

Petitioner's second grounds for review involves the invalidity of the clause at issue because it requires suits to be instituted within one year of the date of death rather than from the date of appointment of decedent's legal representative as required by statute. The Court of Appeals refused to consider this argument because of the alleged failure to raise the same in the District Court.

The District Court referred directly to the very areas of contention that the Court of Appeals said were not prop-

erly raised (8a) when the District Court quoted 46 U.S.C. § 183b(c) and distinguished *Barrette* because that case was not a death action and therefore did not involve subsection (c). Appellees argued the point in their brief and were careful to point out the date of petitioner's appointment as executrix.

The validity of the contract provision was attacked *in toto* by the original motion to strike the third defense of respondent in the District Court. Even if the Court should find that this issue was insufficiently raised in the District Court, the consequent injustice should convince the Court to hear this matter *de novo,* for as *Hormel* v. *Helvering,* 312 U. S. 552, 557, 85 L. Ed. 1037, 1051 (1940), stated, "rules of practice and procedure are devised to promote the ends of justice not to defeat them".

CONCLUSION

Because of the need for a definitive declaration as to the proper interpretation of the statutes involved, and also because of the conflict in existence between various District Court decisions, and the inequity of denying petitioner her day in court, petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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10 Columbus Circle,
New York, New York 10019,
Counsel for Petitioner.

August 30, 1965.

APPENDIX

Opinion by the United States Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 355—September Term, 1964.
(Argued March 5, 1965. Decided May 7, 1965.)
Docket No. 28731

MARY A. SCHWARTZ, as Executrix under the Last Will and Testament of SAMUEL H. SCHWARTZ, deceased,
Libelant-Appellant,

—v.—

S.S. NASSAU, her engines, etc. and
INCRES STEAMSHIP COMPANY, LTD.,
Respondent-Appellee.

Before:

MOORE, KAUFMAN and HAYS,
Circuit Judges.

Appeal from the order and final decree of the United States District Court for the Southern District of New York Dudley B. Bonsal, *Judge*, 223 F. Supp. 374 (1963), denying libelant's motion to strike respondent's defense based on a contractual period of limitations, asserated to violate Rev. Stat. § 4283A, 46 U. S. C. § 183b (1958), and granting respondent's cross-motion for summary judgment dismissing the libel.

Affirmed.

HERBERT LEBOVICI, New York, N. Y. (Lebovici & Safir), *for Appellant.*

RALPH C. KREIMER, New York, N. Y. (Kirlin Campbell & Keating, Daniel J. Dougherty, of counsel), *for Applelee.*

HAYS, *Circuit Judge:*

The only issue presented by this appeal is whether a clause in the contract of passage between passenger and shipowner requiring that an action for wrongful death be "commenced *and process served* . . . within one (1) year from the date when *the death* . . . occurred" is invalid under Section 4283A of the Revised Statutes which makes unlawful maritime contract provisions which provide for "a shorter period . . . for the institution of suits on . . . claims [for loss of life or bodily injury] than one year" from the date of injury, or *in the case of death,* from the appointment of decedent's legal representative.[1] The libelant argues

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[1] 49 Stat. 960 (1935), 46 U. S. C. § 183b (1958):

"Sec. 4283A. *Stipulations limiting time for filing claims and commencing suit.*—

(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred."

"(c) . . . [I]f the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such . . . decedent's estate, but shall be applicable from the date of the appointment of such legal reresentative . . ."

that Article 13 of the contract quoted above provides a period of limitations for "institution" of suit shorter than one year (1) because of the inclusion of the words "and process served" and (2) because the time is to run from the date of death rather than from the date of appointment of decedent's legal representative. This second claim was not raised in the district court and cannot be raised for the first time here. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocer's Ass'n,* 360 U. S. 334, 342 n. 7 (1959); *Scott* v. *Central Commercial Co.,* 272 F. 2d 781 (2d Cir. 1959), cert. denied, 363 U. S. 806 (1960); *Patent & Licensing Corp.* v. *Olsen,* 188 F. 2d 522, 525 (2d Cir. 1951); *Wiper* v. *Great Lakes Eng'r. Works,* 340 F. 2d 727, 731 (6th Cir. 1965).

As to the first claim libelant asserts that since suit is commenced in the federal admiralty courts by the mere filing of a libel, Admiralty Rule 1, the contractual requirement that suit be commenced *"and process served"* within one year has the effect of shortening the limitation period to less than the one year permitted by statute. The district court rejected this argument, denied libelant's motion to strike respondent's defense based on the contractual period of limitation, and granted respondent's cross-motion for summary judgment dismissing the libel. 223 F. Supp. 374 (1963). We affirm.

The facts of the case are undisputed. Libelant Mary A. Schwartz is the widow and executrix of Dr. Samuel H. Schwartz. She and her husband purchased a first-class passage for a cruise aboard respondent's *S.S. Nassau* from New York to Bermuda and return. On the face of the ticket reference was made to "the contract terms and conditions . . . set forth on this page and the over-page, to which passenger expressly agrees and which are to apply and govern the relations whatever they may be between passenger and the carrier . . ." Article 13, printed on the back of the ticket, reads in pertinent part as follows:

"Suit to recover on any claim shall not be maintainable unless commenced and process served as follows:

(1) Within one (1) year from the date when the death or injury occurred in respect of any claim for loss of life or bodily injury in any case where said Section 4283A [of the Revised Statutes] shall apply . . ."

Article 15 of the contract states that:

"The terms of this passage contract shall be separable and illegality or invalidity of any article, paragraph, clause, or provision of this passage contract, in whole or in part, shall not affect or invalidate any other article, paragraph, clause or provision thereof."

While on board the vessel Dr. Schwartz became ill. The ship's physician was consulted and that same day Dr. Schwartz was removed by helicopter to a hospital in North Carolina, where he died about 2:00 A.M., the following day, May 8, 1960.

Mrs. Schwartz was appointed executrix under Dr. Schwartz's will on May 20, 1960. She originally brought suit against respondent for wrongful death in a New York court by service of summons on August 8, 1961, more than fourteen months after her appointment as executrix, and fifteen months from the date of Dr. Schwartz's death.

She filed a libel against respondent in the United States District Court on May 3, 1962, five days less than two years from her husbands' death.

Section 4283A applies generally to all personal injury and wrongful death cases in which "the manager, agent, master, or owner of any sea-going vessel . . . transporting passengers or merchandise or property from or between ports of the United States and foreign ports" has provided "by rule, contract, regulation, or otherwise" a time period

within which a claimant must give notice or bring suit. The statute is one "of general import, enacted for the purpose of regulating the relationship between a common carrier . . . and passengers with reference to duties, obligations and restrictions of the carrier in connection with its issuance of tickets and its liability to passengers for safe passage thereunder," *Moore* v. *American Scantic Line, Inc.*, 30 F. Supp. 843, 845 (S. D. N. Y. 1939), aff'd, 121 F. 2d 767 (2d Cir. 1941); accord, *Scheibel* v. *Agwilines, Inc.*, 156 F. 2d 636, 638 (2d Cir. 1946), and is applicable in state as well as federal courts, see *Ayoub* v. *Moore-McCormack Lines, Inc.*, 17 Misc. 2d 519, 191 N. Y. S. 2d 411 (App. T. 1958); *Glusman* v. *United States Lines Co.*, 39 Misc. 2d 845, 241 N. Y. S. 2d 960 (Sup. Ct. 1963).

The purpose of the statute of which Section 4283A is a part, "was to encourage shipbuilding and [its provisions] . . . should be liberally construed in the ship-owner's favor." Section 4283A "is not . . . an isolated enactment whose negative language should be narrowly construed, but is a declaration of Congressional policy as to lawful contractual time limitations . . ." *Scheibel* v. *Agwilines, Inc. supra*, 156 F. 2d at 638.

Appellant's argument rests on the premise that the statute is to be interpreted in the light of the federal rules for tolling a statutory period of limitations. Admiralty Rule 1; see *Bomar* v. *Keyes*, 162 F. 2d 136 (2d Cir.), cert. denied, 332 U. S. 825 (1947). But see *Sauerzopf* v. *North Am. Cement Corp.*, 301 N. Y. 158, 93 N. E. 2d 617 (1950) (applying state statute of limitations rule in tolling a federal statute). It follows, says the plaintiff, that a contract that requires more than the federal admiralty rules require, i.e., that process also be served within a year, is invalid. However, under New York procedure an action is commenced for the purpose of tolling the statute of limitations, not as under the federal rule by the filing of a complaint, but by the service of process. New York Civil Practice Act § 218, now Civil Practice Law and Rules §§ 203(b), 304.

The problem of accommodatinng variant forms of federal and state procedure to federal substantive law is fraught with difficulty when a case arises in which a litigant may find himself time-barred by application of state procedural rules but not time-barred if federal procedural rules are applied. See *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949); *Sauerzopf* v. *North Am. Cement Corp., supra; Irons* v. *Michigan-Atl. Corp.*, 279 App. Div. 32, 35, 108 N. Y. S. 2d 824, 827 (4th Dep't 1957).[2] The draftsman of a contractual clause providing for limitation periods, such as the clause in question here, will find it difficult to devise a provision which will meet the requirements of a statutory rule regulating such clauses and which will, at the same time, be fully operative in state, federal and foreign courts.

Doubtless these drafting difficulties led to the inclusion of the separability provision of Article 15. Under that provision the reference to service of process in Article 13 is severable. Thus the defense of limitation is based on libel-

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[2] An analogous situation was presented to the Supreme Court in its second opinion in *Herb* v. *Pitcairn*, 325 U. S. 77 (1945). There an injured workman had brought suit under the Federal Employers' Liability Act in an inferior state court that, as it appeared, did not have jurisdiction. The issue presented to the Court was whether the plaintiff had "commenced" the action within the meaning of Section 6 of the Federal Employers' Liability Act so as to toll the statute of limitations. The Court stated that:

> "An action is 'commenced' for these purposes as a matter of federal law when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment. if the state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try, and otherwise determine that cause. . . . Clearly, . . . when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without issuance of new initial process, it is enough to commence the action within the federal statute." *Id.* at 78-79. See *Burnett* v. *New York Cent. R.R.*, —— U. S. —— (1965) (slip sheet, April 6, 1965, pp. 2-3, 7-8, 10).

ant's failure to comply with other clearly legal provisions of the contract without regard to the severable, supposedly illegal, provision.

Moreover, the express reference in Article 13 of the contract to Section 4283A cannot be disregarded. The conditions, exceptions and provisos of the statute are to be read into the contract. Thus the phrase "and process served" is to be construed in the light of the incorporation of the statute by reference. The phrase would then read "and process served *where suit must be instituted by service of process.*"

It does not follow from our holding the contractual limitation provision valid and enforceable in the present case that the provision would be enforceable in every conceivable fact situation. Our brother Kaufman, when a district judge, suggested in *Barrette* v. *Home Lines, Inc.*, 168 F. Supp. 141, 143 (S. D. N. Y. 1958), that "a litigant believing the provisions of commencement and service to be so interwoven as to require both conditions to be met within one year may be forced to abandon rights which he has in the belief that while he could commence his action within one year he could not both commence and serve within that period." No such situation is presented by the case we are now considering. Libelant here has no excuse, based either on the literal language of the provision or on any equity arising out of reliance on it, for the delay in instituting suit. It would be extremely technical to hold that she can take advantage of an "abstract "illegality" of the limitations clause.

Affirmed.

KAUFMAN, *Circuit Judge* (dissenting):

In this case Mrs. Schwartz, a widow, is deprived of her day in court by a holding that, at one and the same time, language in a contract of adhesion—drafted by the steamship company and accepted by the passenger on a take-it-

or-leave-it basis—should sometimes be deleted, should sometimes be augmented, and at other times is void under federal law. Believing that such a holding is inconsistent with basic notions of contract interpretation and fundamental fairness, I respectfully dissent.

At the outset, it is helpful to set out the essence of the contract clause and statute we must interpret. Article 13 of the contract sought to require any action for the wrongful death of Mr. Schwartz to be "commenced and process served . . . within one (1) year from the date when the death . . . occurred." The question is whether that requirement is proscribed by Section 4283A of the Revised Statutes, 46 U. S. C. § 183b, which makes unlawful maritime contract clauses providing for "a shorter period . . . for the institution of suits on . . . claims [for loss of life or bodily injury] than one year" from the date of injury, or in the case of death, from the apointment of decedent's legal representative.

There can be no doubt that Article 13, as written, provides for a shorter period than one year in which to institute suit. Suppose, for example, that the contract provided that any action for wrongful death be commenced and pretrial discovery completed within one year from the date of death. Such a clause manifestly would be invalid because in order to comply with the dual requirements before the 365th day it would be necessary to institute an action in less than a year. Similar reasoning leads to rejection of Article 13, which seeks to require both commencement of the action and service of process within a year. The contractual clause is invalid because in most instances a suit will have to be instituted in less than a year in order to give the plaintiff time to complete service of process within the 365-day period.

I do not believe, as the majority suggests, that the "or process served" phrase can be excused by "drafting difficulties" that arise because an action is deemed instituted,

for limitations purposes, at different times in different situations. The opinion of my brothers in the majority is hinged on the argument that in the New York state courts an action is commenced by the services of process; in the federal courts an action based upon federal question or admiralty jurisdiction is commenced when the complaint or libel is filed; and in a federal court diversity suit, where the applicable limitation provision is geared to service of process, the mere commencement of the action by filing a complaint does not toll the time period. But a draftsman who wanted to take account of these variations would not have to insert the "and process served" language [if he was really trying to avoid the proscriptions of Sect. 4283A] and one who did would, as the District Court aptly recognized, be inartistic.

It is reasonable to assume that a Congress, enacting legislation to outlaw any contractual provisions which would in any way curtail the period for the "institution of suits" to less than a year, was well aware that an action in some state courts is commenced by the service of process and that a federal admiralty suit is begun by filing a libel. Congress, by using the term of art "institution" of a suit, automatically incorporated the state rules making service of process a prerequisite to the tolling of a state limitations period where that is required. Similarly, in a diversity action the one-year minimum period for "instituting" a suit would include, where applicable, the requirement that process be served in order to toll the governing limitations period. Therefore, the phrase "and process served" is sheer surplusage in these two instances. But, on the other hand, in a federal admiralty action, such as the one before us, the suit would be "instituted" and the limitations period tolled once the libel was filed. Article 13 of the contract, by seeking to impose the additional burden of service of process in this admiralty action, flies in the face of the federal policy articulated in Section 4283A.

Nor do I believe that the severability provision of Article 15 can be invoked to excise the "and process served" language in order to resuscitate Article 13. This case is readily distinguishable from *Foster* v. *Cunard White Star, Ltd.*, 121 F. 2d 12 (2 Cir. 1941), where two separate provisions in a contract, one governing notice and the other institution of suit, were held severable. Here, the restrictions or the institution of suit and service of process are an interwoven condition in one clause too closely related to be severed. See *Barrette* v. *Home Lines, Inc.*, 168 F. Supp. 141 (S. D. N. Y. 1958). To sever some of the words used in describing a unitary time concept amounts, in practical effect, to a redefinition of the time period. In other words, if it were valid to "save" illegality by a mere excision of an invalid phrase or word, then it would follow, for example, that a contract providing for commencement of suit in "one year less ten days" could be resurrected in litigation by a savings clause similar to Article 15.

Obviously, the purpose in enacting Section 4283A is important in judging whether a contract clause meets the requirements fixed by Congress. I cannot agree with my brothers that because the section is an integral part of a comprehensive body of regulations declaratory of a federal policy to encourage shipbuilding, all contractual provisions referring to the section should be liberally construed in the shipowner's favor. The case cited for this proposition, *Scheibel* v. *Agwilines, Inc.*, 156 F. 2d 636 (2 Cir. 1946), is not really determinative because it simply held that a contract limitation clause valid under 4283A is, because of considerations of uniformity, controlling despite state legislation which seeks to prescribe a longer period. Indeed, when the scope of 4283A was first considered, a shipowner's contention that the section was narrowly confined to limitation-of-liability proceedings was definitively rejected. *Moore* v. *American Scantic Line, Inc.*, 30 F. Supp. 843 (S. D. N. Y. 1939), *aff'd*, 121 F. 2d 767 (2 Cir. 1941). In reaching that

conclusion the court noted that the statute was designed "to remedy abuses which had arisen through the efforts of shipowners engaged in common carriage to limit unreasonably their obligations as carriers of . . . 'living' cargoes." 30 F. Supp. at 845.

I agree that statutory provisions protecting shipowners against losses due to fire not caused by their neglect, 46 U. S. C. § 182, and setting limits to the *extent* of their liability, 46 U. S. C. § 183, were designed to help the maritime industry and should be so construed. But surely the statute of limitations provision, permitting the carrier to require the institution of suits for death or bodily injury within one year, was not designed to subsidize the shipping industry. Rather, Section 4283A sought to eradicate the evil of shipowners dictating unreasonably restrictive terms to passengers who, as a practical matter, lack any real power to negotiate. It was, in fact, intended by Congress to prevent shipowners from imposing unreasonably short periods of limitation on actions for personal injuries or death. The statute, as I view it, sets out what Congress deemed to be the shortest reasonable period of limitation—an absolute standard, any breach of which is invalid. See *Moore* v. *American Scantic Line, Inc., supra.* This interpretation is supported by Section 4283B, enacted less than a year after 4283A, which expressly declares any contract purporting "to lessen, weaken or avoid the right" of any claimant to a trial of a claim for loss of life or bodily injury to be against public policy and void.

As between the shipowner—however financially oppressed he may have been during the great depression when 4283A was enacted—and the passenger, any rule of construction that favors the shipowner ignores not only Congressional intention but practical realities as well. The maxim that a fixed, printed-form contract is to be construed most strongly against the drafter, 4 Williston, Contracts § 621 (3d ed. 1961); 3 Corbin, Contracts § 559 (1960); Restatement of

Contracts, § 236(d), is particularly applicable in a case such as this where the "adhesion" agreement[1] is presented on a take-it-or-leave-it basis to one in a disadvantageous bargaining position. Here we do not have a legal transaction resulting from the give-and-take of those on an equal bargaining plane. Rather, "the weaker party's contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all." Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 632 (1943). As Judge Frank recognized, in a contract of adhesion

> with one-sided control of its terms, when the one party has no real bargaining power, the usual contract rules, based on the "freedom of contract," cannot be applied rationally. For such a contract is "sold not bought." The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather. *Siegelman* v. *Cunard White Star Ltd.*, 221 F. 2d 189, 204 (2 Cir. 1955) (dissenting opinion).

At the same time, I believe it is really begging the question to urge that because the draftsman specifically referred to Section 4283A, Article 13 should be construed to go only as far as the statute permits. Who is not aware that the typical passenger (including judges) reads the fine print terms of such contracts superficially, if at all. In any event, the voyager should not be put to the task of reconciling the contract language with the statute or running to the nearest law library to read the statute and the cases interpreting it.

---

[1] Raymond Saleilles, a French legal authority, coined the phrase *"contrats" d'adhésion,"* using it to describe contracts "in which one predominant unilateral will dictates its law to an undertermined multiple [e.g., all passengers using Incres vessels] rather than to an individual . . ., as in all contracts which, as the Romans said, resemble much more a law than a meeting of minds." Saleilles, De la Déclaration de volunté 229 (1901).

Finally, some comment is in order concerning my brothers' concession that Article 13 may not be enforceable in every conceivable fact situation. I assume, by their vote to affirm, that they agree with the District Court that if this action had been instituted within one year, but the marshal had not affected service until after the expiration of the year, the defense of the limitation clause would fall. See 223 F. Supp. 374, 376 (S. D. N. Y. 1963). And from their allusion to the relevance of equities based on reliance and their quotation from my opinion in *Barrette* v. *Home Lines, Inc., supra,* I gather that the contract clause would not defeat one who failed to institute suit because he thought he could not serve process within the limitation year. With all respect, I do not believe that this functional approach is proper in interpreting contractual language which, at least theoretically, is written to govern the parties' actions. The validity of the clause must be judged as of the time it was entered into and not on the basis of subsequent conduct or events occurring long after the contract was signed, sealed and delivered. If, as my brothers apparently concede, Article 13 would have limited Mrs. Schwartz's freedom of action in certain conceivable fact situations, then she was entitled, by virtue of Section 4283A, to regard the provision as invalid. But a pragmatic test, opening the door to vague and uncertain inquiries about reliance, forces the courts into an area in which precisely such inquiries are to be avoided by looking to the specific language of the contract alone.

If Incres wanted to take advantage of the one-year rule of Section 4283A, its draftsman should have done no more than the statute permits. But having done more, whether through inartistry or imposition, the carrier should be remitted to the normally operative two-year statute of limitations of the Death on the High Seas Act, 46 U. S. C. § 763, with which Mrs. Schwartz clearly complied.

In any event, even were I to accept my brothers' notion that the illegality of Article 13 should not be determined in the "abstract," I believe they are in error in affirming the lower court for its ruling was on a motion for summary judgment and, at the very minimum, the question of reliance *vel non* presented triable issues of fact. Indeed, the affidavits presented to the District Court did not discuss the reliance issue, although it appears that Mrs. Schwartz did move with dispatch and retained an attorney prior to the expiration of the one-year period, who in fact sent a claim letter to the carrier before that period had expired. It seems harsh to deprive the libelant in this summary fashion of at least an opportunity to show that, even on the majority's approach, Article 13 did not foreclose her right to seek recovery for the wrongful death of her husband.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 524

MARY A. SCHWARTZ, as Executrix under the Last Will and Testament of SAMUEL H. SCHWARTZ, deceased,

Petitioner,

against

SS. *NASSAU,* her engines, etc., and

against

INCRES STEAMSHIP COMPANY, LTD.,

Respondent.

BRIEF OF RESPONDENT, SS. *NASSAU,* HER ENGINES, ETC. AND INCRES STEAMSHIP COMPANY, LTD., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 991.

MARY A. SCHWARTZ, as Executrix under the Last Will and Testament of SAMUEL H. SCHWARTZ, deceased,

Petitioner,

against

SS *Nassau,* her engines, etc., and

against

INCRES STEAMSHIP COMPANY, LTD.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of United States District Judge Dudley Bonsal, denying libelant's motion to strike respondent's statute of limitations defense and granting respondent's motion to dismiss the libel, is officially reported at 223 F. Supp. 374. It is printed in Appellant's Appendix in the court below.

The opinion of the Court of Appeals for the Second Circuit is reported in 345 F. 2d 465 and is printed in Petitioner's Appendix beginning at page 10.

Jurisdiction.

It is not disputed that the jurisdiction of this court is invoked by virtue of 28 U. S. Code 1254. (1).

Question Presented.

Whether respondent's time-for-suit clause in the ticket-contract, which barred the petitioner's suit as not timely filed within one year from the date when petitioner was appointed executrix of a deceased passenger, was valid under Section 4283A(c) of the Revised Statutes (46 U. S. Code 183b).

Statement of Case.

The deceased, husband of petitioner and a passenger aboard respondent's vessel, suffered a heart attack aboard the SS *Nassau,* enroute between New York and Bermuda, on May 7, 1960. The vessel arranged to fly him by helicopter to the United States mainland where he was hospitalized. He died on May 8, 1960. Petitioner was appointed executrix on May 20, 1960.

She filed a libel against respondent in the United States District Court for the Southern District of New York on May 3, 1962, i.e., seventeen days less than two years from her appointment and five days less than two years from her husband's death.

The ticket contract under which petitioner and her husband sailed reads in pertinent part under Article 13:

> "Suit to recover on any claim shall not be maintainable unless commenced and process served as follows:
>
> (1) Within one (1) year from the date when the death or injury occurred in respect of any claim for

loss of life or bodily injury in any case where said Section 4283A [of the Revised Statutes] shall apply . . ."

Article 15 of the contract states that:

"The terms of this passage contract shall be separable and the illegality of any article, paragraph, clause, or provision of this passage contract, in whole or in part, shall not affect or invalidate any other article, paragraph, clause or provision thereof."

Section 4283A of the Revised Statutes (46 U. S. Code 183b) reads:

"SEC. 4283A. Stipulations limiting time for filing claims and commencing suit.—(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred."

"(c) . . . [I]f the action is one for wrongful death, any 'awful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such . . . decedent's estate, but shall be applicable from the date of the appointment of such legal representative . . ."

Federal District Judge Bonsal held (223 F. Supp. 374) that the ticket contract provision was valid and barred

the suit because the libel was not filed within one year from petitioner's appointment. Since the filing of the libel after the one year period was the earliest time when the suit could be regarded as having been instituted, it is and was impossible for any genuine issue to have been presented concerning the question of later service of process. The Second Circuit Court of Appeals (345 F. 2d 465) affirmed. The judgment of the United States Court of Appeals was entered on May 7, 1965.

Following that, libelant-appellant sought re-hearing which the Second Circuit Court of Appeals denied on June 7, 1965.

Reasons for Denying Writ.

1.

The writ is sought by the petitioner because, she says, this ticket clause has been divergently ruled upon. But this argument is more apparent than real.

Clearly there is no conflict at all between any Circuits and in fact the only other federal district court that has been reported as ruling upon this matter is the District Court of Massachusetts in the case of *Abbasciano* v. *Home Lines Agency, Inc.*, 144 F. Supp. 235 (1956), which is in exact harmony with the Second Circuit. That case flatly held an identical ticket clause valid.

Judge Bonsal in making his district court determination in the case at bar, notwithstanding *Barrette* v. *Home Lines, Inc.*, 168 F. Supp. 141, had every right to disagree with the reasoning expressed therein by Judge Kaufman in his former function as a federal district judge, and to hold the instant ticket clause valid. Now the Second Circuit in the instant case has affirmed its validity. The only other known decision on this point is the decision of a non-appellate state

court, Supreme Court, Kings County, viz., *Glusman* v. *United States Lines Co.*, 241 N. Y. Supp. 2d 960, 39 Misc. 2d 845, which is completely based on the now-overruled *Barrette* decision that was rejected by the Court of Appeals.

2.

The decision below was correct. Petitioner again alleges the "abstract illegality" of the clause by conjuring another hypothetical illustration wherein another tardy litigant might abandon his case in the belief that although he was able to start his suit by filing his initial pleading in federal court within one year, he would be unable to serve process within that period. In his dissent, Judge Kaufman urged that the question again be determined in the "abstract". While agreeing with the majority that the service of process provision in the contract is mere unenforceable surplusage in a federal court action such as petitioner's, Judge Kaufman nevertheless rejects the concept that such a clause may have valid significance in the context of various state court procedures. Manifestly, it is not the function of certiorari to obtain review of hypothetical or "abstract" controversies.

The Second Circuit termed this an "abstract 'illegality'" and refused to credit that hypothetical possibility with any concrete or reversal-warranting effect.

Mrs. Schwartz' husband died May 8, 1960.

Mrs. Schwartz was appointed executrix May 20, 1960.

Suit was commenced (filed) May 3, 1962.

It strains plausibility to say the petitioner can call upon a court to tailor her facts to fit the hypothetical situation under which another hypothetical litigant might conceivably be prejudiced. This Honorable Court was presented with such abstract hypothetical possibilities that might someday evolve from its landmark decision on the question

of whether a case was or was not within the maritime jurisdiction. It wrote:

> "* * * Various far-fetched hypotheticals are raised * * *. We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction * * *". *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206 at 210.

Moreover, the instant petition has glossed over the effect of Article 15 of this ticket-contract under which article the Court of Appeals below held that the reference to service of process in Article 13 is severable. The Court correctly stated that it was libelant's failure to comply with the other clearly legal contract provisions, notwithstanding the severable, supposedly illegal, provision, upon which the defense of limitations was based.

In 1941, the Second Circuit Court of Appeals affirmed the dismissal of a passenger's personal injury action brought twenty-five (25) months after the event. The dismissal was based on a ticket provision limiting suits to one year.

Plaintiff asserted that, "* * * this provision is inextricably tied to, and made dependent upon, a provision for notice of claim within 40 days after termination of the voyage". *Foster* v. *Cunard White Star Ltd.*, 121 F. 2d 12, 13 (2 Cir. 1941).

Clearly the notice of claim provision in that case was invalid because contrary to the same statutes involved in the case at bar. The plaintiff in that *Foster* case argued in virtually the same words used in the *Barrette* case; virtually the same words used by the dissent and by the petitioner in the case at bar in the lower courts.

The Second Circuit, referring to the language of that argument, wrote (121 F. 2d at page 13) that, "* * * the illegality of one was not intended to, and should not, invalidate the other. (Citing cases.)" The cited cases supported, and still support, the sound doctrine of severability which the Second Circuit has herein applied.

The decisions of the District Court and of the Second Circuit in this *Schwartz* case were correct and review is not warranted.

Conclusion.

The instant petition should be denied.

Respectfully submitted,

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END